



August 17, 2015

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Notice of Ex Parte Communication, MB Docket No. 10-71

Dear Ms. Dortch:

On Thursday, August 13, 2015, Rick Kaplan,¹ Benjamin F.P. Ivins and the undersigned of the National Association of Broadcasters (NAB) met with Matthew Berry and Alison Nemeth of the Office of Commissioner Pai to discuss the Commission's network nonduplication and syndicated exclusivity rules. The NAB representatives also participated in a separate meeting on the same subject with Valery Galasso of the Office of Commissioner Rosenworcel.

During the meetings, we explained that the Commission's exclusivity rules are a critical part of the bargain that led to Congress granting the cable industry the right to compulsory copyright licenses.² These licenses allow cable operators to retransmit programming contained in broadcast signals at government-established, below-market rates—without bargaining for such content in the marketplace or incurring any transaction costs.³ Cable compulsory copyright licenses were crafted in reliance on the FCC's exclusivity rules, which serve as a critical counterbalance to the ability of cable operators to cheaply import distant signals under the license.⁴ Retaining the “artificial” market established by compulsory

¹ Mr. Kaplan participated via telephone.

² 17 U.S.C. § 111(c). Use of the cable compulsory licenses is conditioned on compliance with the “rules, regulations, or authorizations of the Federal Communications Commission”—including the exclusivity rules. *Id.*

³ See, e.g. Statement of William J. Roberts, Jr., Acting Associate Register of Copyrights and Director of Public Information & Education, United States Copyright Office Before the Subcommittee on Courts, Intellectual Property, and the Internet Committee on the Judiciary, United States House of Representatives, 113th Congress, 2nd Session (May 8, 2014) (“In general, copyright owners enjoy exclusive rights in their creative works, including the right to decide whether and how to distribute them. A statutory license, which creates an artificial, government-regulated market, is an exception to this rule.”).

⁴ The House Judiciary Committee Report at the time stated that: “[A]ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television

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licensing, while erecting new barriers to broadcasters' ability to enforce their market-negotiated rights, would only serve to unduly and irrationally benefit the cable industry while impeding broadcaster's ability to continue to serve local television viewers.

In light of the symbiosis between compulsory copyright and the FCC's exclusivity rules, it would be irresponsible for the Commission to repeal the rules without Congress first deciding that it no longer sought to grant the cable industry its compulsory licenses. Such an action by the Commission would not only undermine clear and express Congressional intent, but would put another a massive thumb on the scale for the cable industry, and give the broadcast industry the back of the hand.

NAB representatives also addressed the points summarized in the attached slides, which were presented at each meeting.

Respectfully submitted,



Erin L. Dozier
Senior Vice President and Deputy General Counsel
Legal and Regulatory Affairs

Enc.

cc: Matthew Berry, Alison Nemeth, Valery Galasso

industry." H.R. Rep. 94-1476 (1976) at 89. Congress' subsequent adoption of retransmission consent, 47 U.S.C. § 325, does not sufficiently balance against the distant signal license. To the contrary, when Congress established the modern retransmission consent regime, it *relied upon* the enforcement mechanisms available to local broadcast stations in the exclusivity rules. See S. REP. 102-92 (1991), at 38 ("[T]he Committee relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12.").



Network Non-Duplication & Syndicated Exclusivity:

Congress's careful balance to ensure
competition, diversity and localism



What Is “Exclusivity”?

Two rules:

- Network Non-Duplication
 - An enforcement mechanism designed to minimize disputes
 - Allows local broadcast TV stations to protect exclusive distribution rights negotiated with broadcast networks in geographic zone not to exceed 35 miles (55 miles in smaller markets)
- Syndicated Exclusivity
 - Similar to the network non-duplication, but applies to exclusive contracts for syndicated, rather than network, programming



The Exclusivity Rules Are Part of a Larger Balance Developed by the FCC and Congress





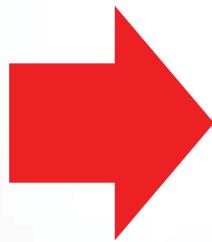
Government's Cable Subsidy

- Section 111 of the Copyright Act permits cable operators to retransmit copyrighted content contained in both local and distant TV broadcast signals for a fee (determined by the government) as long as they comply with various statutory requirements and FCC rules (e.g., exclusivity)
- Result is that the cable industry pays below market rates for this content and avoids nearly all transaction costs associated with acquiring these rights
- As U.S. Copyright Office official explained in testimony last year before the House Judiciary Committee:
 - “In general, copyright owners enjoy exclusive rights in their creative works, including the right to decide whether and how to distribute them. A statutory license, which creates an artificial, government-regulated market, is an exception to this rule.”



Harming the Balance

Government should not, on one hand, intervene in the market to make it easy and inexpensive for cable to import distant signals while, on the other, reduce broadcasters' ability to enforce market-negotiated rights



Broadcasters saddled with
gov't content obligations



Cable relieved of FCC rules and
buoyed by gov't license subsidy



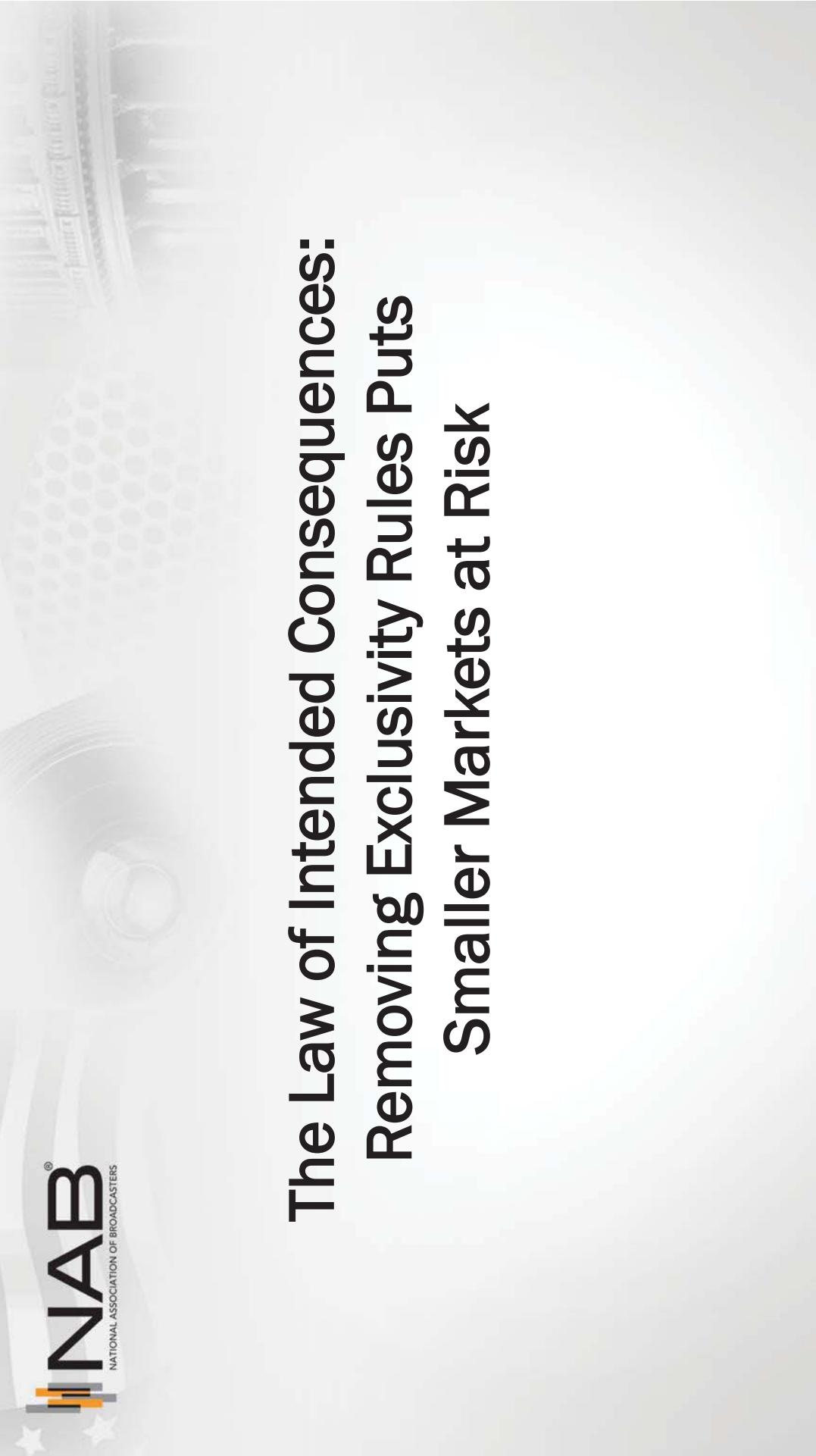
STELAR and Exclusivity

- Congress understands this balance
- Exclusivity is effectuated in the DBS context by statute
 - In 1988, Section 119 of the Satellite Home Viewer Act established a distant signal compulsory copyright license for satellite carriers similar to that for cable
 - License allows DBS to retransmit programs in distant broadcast network signals only to those households unable to receive broadcast signals of same network over-the-air (“unserved household restriction”)
 - This mirrors FCC cable exclusivity rules
- Just last year Congress reaffirmed this balance as it preserved market exclusivity in STELAR while granting DBS a distant signal license



STELAR and Exclusivity

- When Congress renewed the DBS distant signal license in 2014, the Senate report explained:
 - “The reason for [the unserved household restriction] was to preserve ‘localism’ and to prevent non-local or ‘distant’ signals from taking viewers away from local broadcast television stations that provide community-focused programming such as local news and weather.” S. Rep. No. 113-322 (2014) at 2.
- Cable is no different, and the FCC should not undermine this long-standing Congressional scheme by removing rules to disproportionately benefit the cable industry



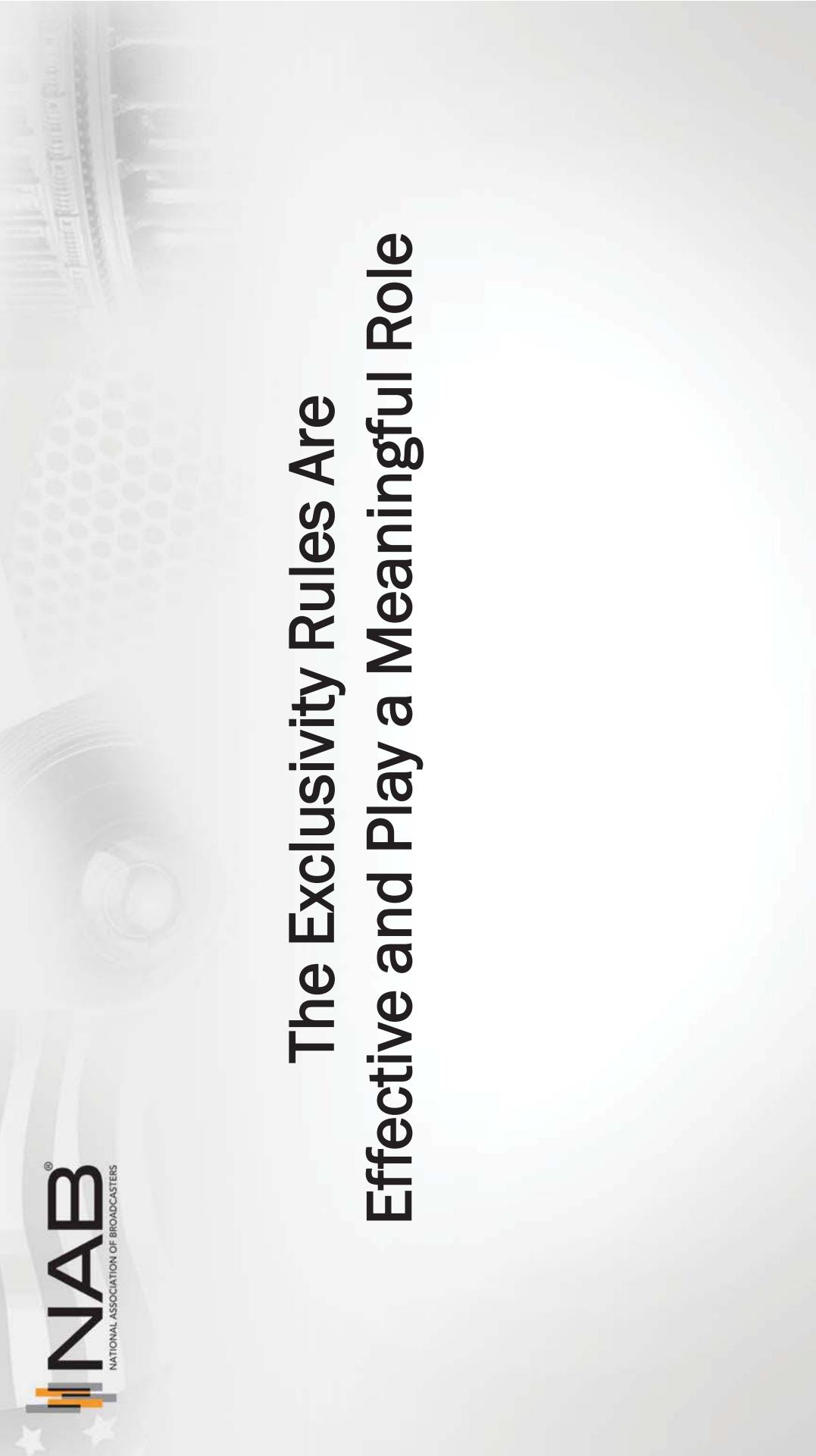
The Law of Intended Consequences: Removing Exclusivity Rules Puts Smaller Markets at Risk





Small Market Issues

- Today, FCC rules protect local TV exclusivity within a geographic zone of 35 miles (or 55 miles in smaller markets)
- For decades, broadcasters have incorporated the FCC's geographic limitation into their contracts and, because of the rules, stations do not negotiate for coverage beyond those distances
- Eliminating the rule incentivizes stronger, large-market stations to seek to expand their exclusive service areas and to reduce or eliminate exclusivity for small market stations



The Exclusivity Rules Are Effective and Play a Meaningful Role





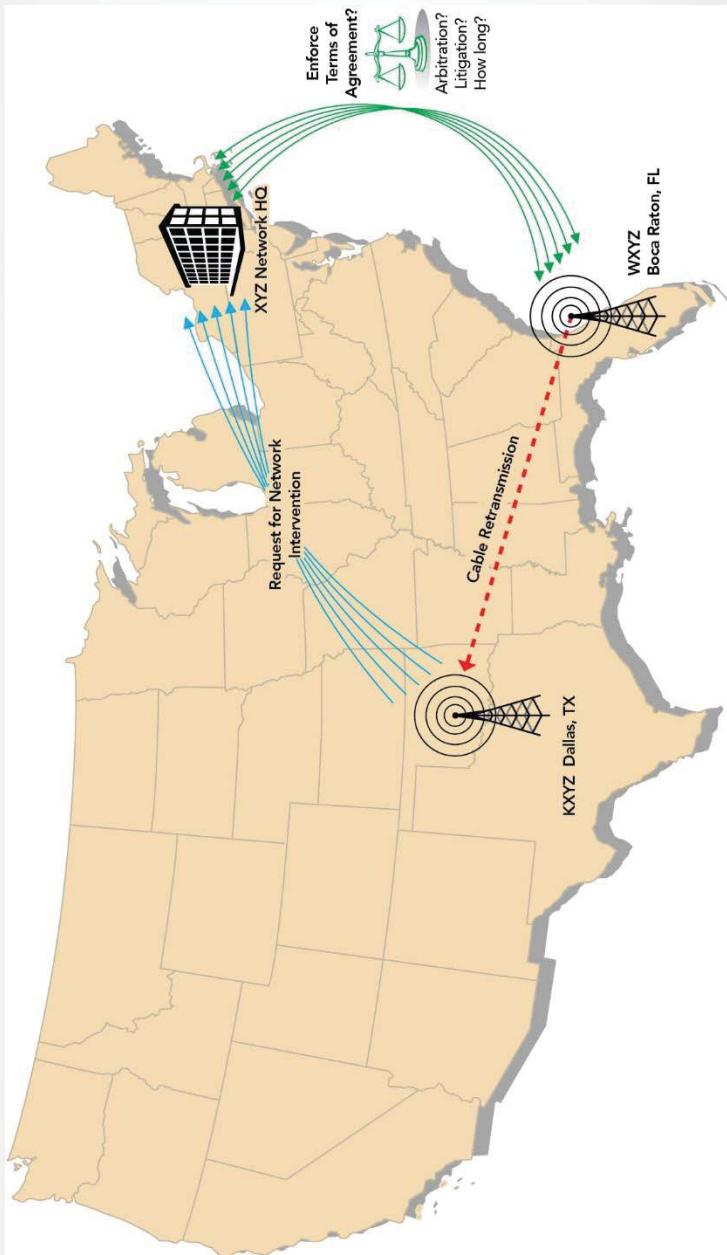
The Rules Matter

The primary rationale given for removing the rules is that they are not needed because private contract can do the same thing. However:

- Cable's big push to get rid of the rules itself undermines any notion that private contract is an adequate substitute; and
- Cable companies know that if they can peel away the FCC enforcement backstop, they can wreak havoc on the retransmission consent system (with consumers as pawns)

Effective Remedy

- Exclusivity rules are an essential enforcement mechanism;
boundary enforcement impractical without FCC mechanism



Current FCC Rules Prevent Consumers Harm





Consumers and Exclusivity

Consumers will be harmed without FCC enforcement of exclusivity rules. The repeal of the rules is likely to lead to, among other things:

- More frequent and protracted retransmission consent disputes
- More consumer confusion
- More of the same rising cable bills they've been saddled with for decades



Consumer Confusion

- When distant signals are pulled into the local market, consumers ultimately suffer
 - What happens if emergencies arise in the distant or local market? How will viewers receive timely, accurate information?
- If distant signals could be imported absent FCC's exclusivity rules, the FCC must put in place new rules to require cable operators to protect consumers from harm due to out-of-market signal importation